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1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
3 SAN FRANCISCO DIVISION
4

5 **IN RE GOOGLE PLAY STORE**
6 **ANTITRUST LITIGATION**

7 THIS DOCUMENT RELATES TO:

8 *Epic Games Inc. v. Google LLC et al.*, Case
9 No. 3:20-cv-05671-JD

10 *In re Google Play Consumer Antitrust*
11 *Litigation*, Case No. 3:20-cv-05761-JD

12 *In re Google Play Developer Antitrust*
13 *Litigation*, Case No. 3:20-cv-05792-JD
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Case No. 3:21-md-02981-JD

STIPULATED ~~PROPOSED~~
SUPPLEMENTAL PROTECTIVE
ORDER GOVERNING PRODUCTION
OF PROTECTED NON-PARTY
MATERIALS

Judge: Hon. James Donato

1 WHEREAS, on December 10, 2020, the Court entered a Stipulated Protective Order in the
 2 above-captioned cases, Case No. 3:20-cv-05671-JD, Dkt. No. 110, approving Dkt. No. 106-1;
 3 Case No. 3:20-cv-05761-JD, Dkt. No. 117, approving Dkt. No. 109-1; Case No. 3:20-cv-05792-
 4 JD, Dkt. No. 78, approving Dkt. No. 76-1 (the “Protective Order”), (collectively, “the
 5 Litigations”);

6 WHEREAS, Section 11(a) of the Protective Order states that its provisions should not “be
 7 construed as prohibiting a Non-Party from seeking additional protections”;

8 WHEREAS, materials that Parties intend to produce in the Litigations may contain
 9 information that is subject to contractual obligations to a Non-Party, including but not limited to
 10 non-disclosure agreements between a Party and Non-Party, or may otherwise contain Non-Party
 11 Protected Material (as defined herein);

12 WHEREAS, Parties have served subpoenas pursuant to Rule 45 of the Federal Rules of
 13 Civil Procedure on Non-Parties;

14 WHEREAS, certain Non-Parties have expressed concerns regarding the production of
 15 competitively sensitive information to Parties in the Litigations absent certain additional
 16 protections beyond those set forth in the Protective Order;

17 WHEREFORE, IT IS HEREBY ORDERED that documents or information disclosed or
 18 produced by Non-Parties or by Parties to the extent such documents or information are designated
 19 as containing Non-Party Protected Material in connection with the Litigations shall be subject to
 20 the following provisions (the “Supplemental Protective Order”):

21 1. GENERAL PROVISIONS

22 1.1 The definitions, terms and provisions contained in the Protective Order
 23 shall be incorporated herein by reference as though fully set forth herein; provided, however, that
 24 in the event of a conflict between any definition, term, or provision of this Supplemental
 25 Protective Order and any definition, term, or provision of the Protective Order, this Supplemental
 26 Protective Order will control with respect to such conflict.

27 1.2 The definitions, terms and provisions contained in this Supplemental
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1 Protective Order shall apply only to those Discovery Materials designated as Non-Party Protected
2 Material in accordance with this Supplemental Protective Order, and nothing herein shall provide
3 any rights or protections to the Parties to the Litigations beyond those set forth in the Protective
4 Order.

5 2. DEFINITIONS

6 2.1 Designating Party: a Party or Non-Party that designates information or
7 items that it produces in disclosures or in responses to discovery in the Litigations as “NON-
8 PARTY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY.”

9 2.2 Non-Party Protected Material: sensitive Non-Party confidential
10 information or documents, disclosure of which to another Party or Non-Party could create a
11 substantial risk of serious harm to the Non-Party.

12 3. SCOPE

13 3.1 This Supplemental Protective Order covers not only documents designated
14 “NON-PARTY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY”, but also
15 any information copied, excerpted, or summarized from documents with such designation and
16 any testimony, conversations, or presentations by Counsel that might reveal information from
17 documents with such designation. However, the protections conferred by this Supplemental
18 Protective Order do not cover the following: (a) any documents or information that is in the
19 public domain at the time of disclosure to a Receiving Party or becomes part of the public domain
20 after its disclosure to a Receiving Party for reasons not involving a violation of this Supplemental
21 Protective Order or the Protective Order, including becoming part of the public record through
22 trial or otherwise; and (b) any documents or information known to the Receiving Party prior to
23 the disclosure or obtained by the Receiving Party after the disclosure from a source who obtained
24 the document or information lawfully and under no obligation of confidentiality to the
25 Designating Party.

26 3.2 Nothing in these provisions should be construed as prohibiting a Non-Party
27 from seeking additional protections.

1 4. DESIGNATION AND USE OF NON-PARTY PROTECTED MATERIAL

2 4.1 In order for materials produced in discovery to qualify for protection as
3 “NON-PARTY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY”, the
4 Designating Party must affix the legend “NON-PARTY HIGHLY CONFIDENTIAL –
5 OUTSIDE COUNSEL EYES ONLY” to each page of any document for which the Designating
6 Party seeks protection under this Supplemental Protective Order;

7 4.2 Unless otherwise ordered by the Court or permitted by all implicated Non-
8 Parties, a Receiving Party may disclose documents and information designated as “NON-PARTY
9 HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY” to the following only:

10 (a) The Receiving Party’s Outside Counsel of Record in this action, as
11 well as employees of Outside Counsel of Record to whom it is reasonably necessary to disclose
12 the documents or information for this litigation and who have signed the “Acknowledgment and
13 Agreement to be Bound” (Exhibit A to the Protective Order);

14 (b) Experts of the Receiving Party (1) to whom disclosure is reasonably
15 necessary for the Litigations and (2) who have signed the “Acknowledgment and Agreement to
16 be Bound” (Exhibit A to the Protective Order);

17 (c) The Court and its personnel;

18 (d) Stenographic reporters, videographers, and their respective staff,
19 professional jury or trial consultants, and Professional Vendors to whom disclosure is reasonably
20 necessary for these Litigations and who have signed the “Acknowledgment and Agreement to be
21 Bound” (Exhibit A to the Protective Order);

22 (e) The author or recipient of a document containing the information or
23 custodian or other person who otherwise possessed or knew the information.

24 4.3 Filing and Filing under Seal. A Party may not file in the public record in
25 this action any Non-Party Protected Material. Non-Party Protected Material may be filed only
26 under seal pursuant to a Court order authorizing the sealing of the specific Non-Party Protected
27 Material at issue. A Party that seeks to file under seal any Non-Party Protected Material must
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1 comply with Civil Local Rule 79-5. In addition to the requirements of Civil Local Rule 79-5(e),
 2 the Party seeking to file under seal any Non-Party Protected Material should identify the Non-
 3 Party whose Non-Party Protected Material has been designated as “NON-PARTY HIGHLY
 4 CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY” and serve the supporting declaration
 5 on the Non-Party so that Non-Party has the opportunity to file a declaration establishing that all of
 6 the designated material is sealable pursuant to Civil Local Rule 79-5(e). If a Receiving Party’s or
 7 Non-Party’s request to file Non-Party Protected Material under seal pursuant to Civil Local
 8 Rule 79-5(e) is denied by the Court, then the Receiving Party may file the Protected Material in
 9 the public record pursuant to Civil Local Rule 79-5(e)(2), unless otherwise instructed by the
 10 Court.

11 4.4 Use of Non-Party Protected Material at Depositions. Except as may
 12 otherwise be ordered by the Court, any person may be examined as a witness at deposition and
 13 may testify concerning Non-Party Protected Material to the extent such person was the author,
 14 recipient, or custodian of the material, or otherwise possessed or had prior knowledge of such
 15 material. For clarity,

16 (a) A present director, officer, agent, employee and/or designated Rule
 17 30(b)(6) witness of a Non-Party may be examined and may testify concerning Non-Party
 18 Protected Material, but to the extent a document is designated as NON-PARTY HIGHLY
 19 CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY and contains another Non-Party’s
 20 Protected Material, all such materials, of which such person did not have prior knowledge, should
 21 be redacted prior to introducing any such document for examination;

22 (b) A former director, officer, agent, and/or employee of Non-Party
 23 may be interviewed or examined and may testify concerning Non-Party Protected Material to the
 24 extent such person was the author, recipient, or custodian of the material, or otherwise possessed
 25 or had prior knowledge of such material, but to the extent a document is designated as NON-
 26 PARTY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY and contains
 27 another Non-Party’s Protected Material, all such materials, of which such person did not have
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1 prior knowledge, should be redacted prior to introducing any such document for examination;

2 (c) Any other witness may be examined at deposition or otherwise
3 testify concerning any document containing Non-Party Protected Material which appears on its
4 face or from other documents or testimony to have been received from, communicated to, or
5 otherwise made known to that witness as a result of any contact or relationship with the Non-
6 Party, but to the extent a document is designated as NON-PARTY HIGHLY CONFIDENTIAL –
7 OUTSIDE COUNSEL EYES ONLY and contains another Non-Party’s Protected Material, all
8 such materials, of which such person did not have prior knowledge, should be redacted prior to
9 introducing any such document for examination; and

10 (d) At deposition, any person other than (i) the witness, (ii) the
11 witness’s outside attorney(s), and (iii) any Person(s) qualified to receive documents designated as
12 NON-PARTY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY under this
13 Supplemental Protective Order shall be excluded from the portion of the examination concerning
14 such information, unless the Non-Party or the witness appearing on behalf of the Non-Party
15 whose Non-Party’s Protected Material is at issue consents to that person’s attendance. If the
16 witness is represented by an outside attorney who is not qualified under this Supplemental
17 Protective Order to receive such information, then prior to the examination, the outside attorney
18 shall be requested to sign and provide a signed copy of the “Acknowledgment and Agreement to
19 be Bound” attached as Exhibit A to the Protective Order, and to confirm that he or she will
20 comply with the terms of this Supplemental Protective Order and maintain the confidentiality of
21 information contained within documents designated as NON-PARTY HIGHLY
22 CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY. In the event that such outside attorney
23 declines to sign the “Acknowledgment and Agreement to be Bound” prior to the examination, the
24 Non-Party may seek a protective order from the Court, in a motion to which the Parties will not
25 object, prohibiting such outside attorney from disclosing Non-Party Protected Material.

26 4.5 Use of Designated Material at Hearings. A Party must make good faith
27 effort to avoid disclosing NON-PARTY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL
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1 EYES ONLY information, directly or indirectly, in an open hearing without prior consent from
2 the Non-Party. If the disclosing party anticipates disclosing any NON-PARTY HIGHLY
3 CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY information in any open hearing, the
4 disclosing party must notify the Non-Party of its intent to disclose such material at least four (4)
5 business days in advance of such disclosure, or, if such notice is not possible, as soon as is
6 reasonably practicable, and describe the materials to be disclosed with reasonable particularity, so
7 that the Non-Party has the opportunity to file an objection to such disclosure and establish that the
8 materials to be disclosed are sealable pursuant to Civil Local Rule 79-5(e) and the Court’s
9 standing orders. If such notice is not given or the Non-Party files such an objection, the
10 Disclosing Party must request that the courtroom be sealed, and that only those authorized to
11 review NON-PARTY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY
12 information remain present during the presentation of such material, unless the Court orders
13 otherwise.

14 4.6 Use of Designated Material at Trial. Any Party that discloses any NON-
15 PARTY HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY materials on any
16 trial exhibit list exchanged with an opposing Party, or that is disclosed to the Court, must disclose
17 such materials to the implicated Non-Party no later than two (2) business days after such
18 exchange or disclosure, and describe the materials with reasonable particularity, so that the Non-
19 Party has the opportunity to file an objection to such disclosure and establish that the materials to
20 be disclosed are sealable pursuant to Civil Local Rule 79-5(e) and the Court’s standing orders. If
21 such notice is not given or the Non-Party files such an objection, the Disclosing Party must
22 request that the courtroom be sealed, and that only those authorized to review NON-PARTY
23 HIGHLY CONFIDENTIAL – OUTSIDE COUNSEL EYES ONLY information remain present
24 during the presentation of such material, unless the Court orders otherwise.

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1 Dated: May 18, 2021

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ORDER

Pursuant to stipulation, it is so ordered.

25 DATED: May 20, 2021

